In another petition filed by one Teong Kai Moi @ Teo Kai Moi (f) *vide* Companies (Winding-Up) No. 28-4 of 1989, against the respondent, Abu Mansor J., dismissed the application with costs on the ground that it was not just and equitable to do so. His Lordship at pp. 5-6, said:

> When one considers the balance of convenience, the interest of the seven judgment creditors far outweighed the interest of the petitioner in having the respondent company to be in existence in order that the respondent company can perform and fulfil its several obligations for the benefit of those judgment creditors who had obtained judgments.

Similarly in this case, a winding-up order would have the undesirable effect of negativing the several Court orders which would work towards the detriment of the opposing creditors.

In the circumstances I am of the view that this is a proper case where I should decline to make a winding-up order and the petitioner is at liberty to enforce her claim by other modes. I therefore dismiss the petitioner's application with costs and I order the costs to be borne by her and the supporting creditors.

ENG SOON PLASTICS CHEMICALS PTE. LTD.

v.

FRIENDTEX INDUSTRIES SDN. BHD.

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL SUIT NO. 22-133-1992]
26 JANUARY 1994

PRACTICE & PROCEDURE: Order 14 RHC - Whether any triable issues - Sale of goods - Claim on invoices - Part payment made - Defence of unmerchantability and set-off - Whether defendant entitled to reject goods - Whether defence of set-off applicable - Consideration of s. 42 & s. 59 of the Sales of Goods Act 1957 - Technical objections - Whether necessary to reply to facts deposed to in an affidavit - Absence of particulars in statement of claim - Whether fatal - No contractual interest on pre-judgment sum - Whether statute on interest must be pleaded to claim interest.

The plaintiff's claim was for goods sold and delivered at the request of the defendant. Part payment was only made on one of the three outstanding invoices. The plaintiff's solicitors issued a notice of demand. The defendant replied by letter dated 3 March 1992 offering to settle the debt in instalments which proposal was rejected by the plaintiff.

The defendant denied liability on the basis of unmerchantability of the goods supplied and raised the defence of set-off purportedly from a possible claim against it by Cheokson Industry Sdn. Bhd. to whom the plaintiff's goods were supplied by the defendant. The defendant also raised several technical objections.

Held:

[1] On the issue of unmerchantability of the goods it was noted that in spite of prior knowledge of this issue, the defendant failed to intimate this in its letter of 3 March 1992 which contents showed unequivocal admission of the debt owed to the plaintiff. Assuming the claim to unmerchantability of the plaintiff's goods was true, the defendant's conduct in accepting and supplying the goods to Cheokson Industry Sdn. Bhd. and its failure to notify the plaintiff of this issue did not entitle the defendant to reject the goods by virtue of s. 42 of the Sales of Goods Act 1957 (the Act) and the defendant was therefore confined to its remedy in damages. In the circumstances the defendant had no valid

defence to the plaintiff's claim for the price of the goods delivered.

[2] Though it appeared that a defence of set-off was founded, the Court was of the view that on the facts of the present case, it was not appropriate and applicable in that the defendant should have proceeded pursuant to s. 59 of the Act in which it could have sued the seller (the plaintiff) for breach of warranty in diminution or extinction of the price or sued the seller for damages for breach of warranty.

At the time the action was filed to date there was no evidence that Cheokson Industry Sdn. Bhd. had sued the defendant as threatened and even if sued the defendant could have brought the plaintiff in as a third party. Thus the proper remedy open to the defendant was by way of counterclaim and not set-off or alternatively a separate claim against the plaintiff for damages.

[3] Counsel for the plaintiff did not dispute the authorities relied on by the Counsel for the defendant on the necessity to reply to facts deposed by one party in an affidavit. However plaintiff's Counsel rightly submitted that the circumstances leading to the issuance of the defendant's letter of 3 March 1992 as explained by the defendant had nothing to do with the plaintiff.

[4] The absence of particulars in respect of the supply of goods and their bills in the statement of claim was not fatal as there were provisions for the defendant to apply for better particulars. In fact the defendant was well aware of the particulars looking at the documents exhibited and was not in any way prejudiced.

[5] The Court agreed with defence Counsel that the statute on interest claimed had to be pleaded. The claim was accordingly disallowed. The Court was of the opinion that the plaintiff had proved its claim clearly and the defendant had failed to set-up a *bona fide* defence or raise triable issues which ought to be adjudicated.

[Plaintiff's claim was allowed, with the exception of prayer (2), with costs].

Cases referred to:
M.G. Sheth & Ors. v. Lam Thye Co. Ltd. [1954] 20 MLJ 230 ***(refd)***
Eastern Supply Co. v. Kerr [1974] 1 MLJ 10 ***(cit)***
Permodalam Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd. [1985] 1 MLJ 151 ***(refd)***

Legislation referred to:
Sales of Goods Act 1957, ss. 42, 59

For the plaintiff - S.C. Yap; M/s. Arthur Lee & Co.
For the defendant - S. Siva; M/s. Cheah, Teh & Su

JUDGMENT

Haidar Bin Mohd Noor J:
Initially this Order 14 application of the plaintiff was heard by the Senior Assistant Registrar wherein she allowed the application with costs of RM350 on 6 January 1993. However, it came to the knowledge of the defendant's solicitors that since 1 January 1993 the Senior Assistant Registrar no longer had the jurisdiction to hear Order 14 applications by virtue of Arahan Amalan 8 tahun 1992 issued on the direction of Honourable the Chief Justice. As a result, the defendant filed a summons in chambers on 26 January 1993 (encl. 21) to set aside the order made by the Senior Assistant Registrar on 6 January 1993. Mr. S.C. Yap, Counsel for the plaintiff conceded on this issue of no jurisdiction on the part of the Senior Assistant Registrar, I accordingly allowed the application of the defendant and set aside the said order of the Senior Assistant Registrar and ordered that the Order 14 application of the plaintiff be heard before me.

Essentially, the plaintiff's claim against the defendant is for goods sold and delivered at the request of the defendant, particulars whereof were given by the plaintiff to the defendant from time to time (see para 3 of the statement of claim). The plaintiff's claim is for the sum of SD$134,250 or in Malaysian Ringgit $212,584.88 based on the exchange rate of 158.35 on 25 February 1992 (see exhibit "LBC-1"). The claim is based on three invoices (see exhibit "LBC-3") and the defendant was duly notified by the plaintiff (see exhibit "LBC-2"). The defendant made part payment of SD$24,000 for invoice no. 10319 dated 11 May 1991 leaving a balance of SD$34,500. The defendant issued a cheque no. 588368 dated 2 September 1991 in settlement of the balance sum of SD$34,500 in respect of invoice no. 10319. Cheque no. 588368 was, however, dishonoured by the bank. The plaintiff's solicitors then issued a notice of demand dated 25 February 1992 to the defendant claiming SD$134,250 (see exhibit "LBC-4"). The defendant by way of letter dated 3 March 1992 proposed to settle the sum demanded by way of instalments (see exhibit "YSC-1"). The plaintiff's solicitors wrote a letter dated 4 April 1992

rejecting the proposal of the defendant to pay the sum owing to the plaintiff by instalments (see exhibit "LBC-6"). Mr. S.C. Yap, Counsel for the plaintiff submitted that the plaintiff is not claiming interest of SD$9,600 as stated in YSC-1 .

From the affidavits of the defendant (encls. 13 and 37) and the submission of Mr. Siva, its Counsel, the following issues were raised:

(1) The defendant denied liability on the basis of unmerchantibility of the goods supplied and the defence of set off in the sum of RM345,900 purportedly a possible claim against it by Cheokson Industry Sdn. Bhd. to whom the plaintiff's goods were supplied by the defendant.

(2) Technical objections:

(a) No reply by the plaintiff in respect of the claim of the defendant in its affidavit, regarding the explanation of the defendant through its director relating to the circumstances leading to the issuance of exhibit YSC-1 by the defendant.

(b) No particulars averred in the statement of claim.

(c) There was no contractual rate of interest on the pre judgment sum and the statute must be pleaded if the plaintiff is to pursue this claim of interest.

Issue (1)

On the issue of unmerchantibility of the plaintiff's goods it is interesting to note that in spite of the prior knowledge of this issue (assuming it is true) (see exhibits S1 and S2 in encl. 13) the defendant did not intimate this issue at all in its letter dated 3 March 1992 (exhibit YSC-1) to the plaintiff proposing to settle the sum of SD$134,500 by instalments. In fact, the defendant even proposed to pay interest of SD$9,600 as on 25 April 1992! The defendant stated in the last para of YSC-1 thus:

> We sincerely hope you can accept our proposal. We are very thankful for your patience and understanding so far and we assure you that we will make every effort to let these payments clear.

It seems to me that the above statement shows the unequivocal admission of the defendant that it owed the plaintiff the sum it offered to settle in instalments. However, this proposal was rejected by the plaintiff (see exhibit "LBC-6").

Even assuming that the claim of the defendant on the unmerchantibility of the plaintiff's goods is true, the conduct of the defendant in accepting and supplying the goods to Cheokson Industry Sdn. Bhd. and not notifying the plaintiff of this issue subsequently would not entitle the defendant to reject the goods by virtue of s. 42 of the Sales of Goods Act 1957 (Act 382) which reads:

> 42. Acceptance.
>
> The buyer is deemed to have accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after a lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

The defendant's dealing with the goods constituted an acceptance, and therefore, it had lost its right to reject and was confined to its remedy in damages (*M.G. Sheth & Ors. v. Lam Thye Co. Ltd.* [1954] 20 MLJ 230). In the circumstances the defendant had no valid defence to the plaintiff's claim for the price of the goods delivered (*Eastern Supply Co. v. Kerr* [1974] 1 MLJ 10).

The Supreme Court in *Permodalam Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] 1 MLJ 151 sets out the differences between 'set-off' and 'counterclaim' where at p. 161, Salleh Abas LP (as he then was) said:

> It is, therefore, clear that a counterclaim is wider than a defence of set-off and that whilst the former is a separate action by a defendant against a plaintiff, the latter is essentially a defence, although a defendant is entitled to add it as a counterclaim. Being a defence to a plaintiff's action, the matter sought to be set-off must essentially be connected with or form part of the matter upon which the plaintiff's actions founded.

Though it may appear that a defence of set-off may be founded, I am of the view, that on the facts of the present case, it is not appropriate and applicable for the following reasons:

(1) the defendant should proceed as provided under s. 59 of the Sales of Goods Act 1957 in which he may:

(i) set-up against the seller (i.e. plaintiff) the breach of warranty in diminution or extinction of the price; or

(ii) sue the seller (i.e. plaintiff) for damages for breach of warranty.

(iii) At the time the action was filed by the plaintiff and until now there has been no evidence put forward by the defendant that Cheokson Industry Sdn. Bhd. sued them as it threatened to do in S.2.

(iv) Even if Cheokson Industry Sdn. Bhd. were to sue the defendant, the defendant can then bring in the plaintiff as a third party.

On the facts of this case the proper remedy open to the defendant is to proceed by way of a counterclaim and not set-off or alternatively sue the plaintiff separately in damages. In that event an Order 14 judgment could be given to the plaintiff but with an order of stay pending the disposal of the counterclaim if the counterclaim exceeds the claim.

Issue 2(a)

Mr. S.C. Yap, Counsel for the plaintiff did not dispute the authorities relied on by the defendant's Counsel on the necessity to reply to facts deposed by one party. Mr. S.C. Yap rightly submitted that the circumstances leading to the issuance of the letter (exhibit "YSC-1") as the defendant tried to explain thereon has nothing to do with the plaintiff. In any event the letters S.1 and S.2 were dated 15 July 1991 and 27 July 1991 respectively and in spite of those letters the defendant still wrote the letter dated 4 March 1992 (YSC-1) to the plaintiff offering to settle the debt by instalments and nothing was mentioned about the possible claims of Cheokson Industry Sdn. Bhd. and about the unmerchantibility of the plaintiff's goods and for that matter about the assurance of one Mr. Lim from the plaintiff company. This was the best opportunity for the defendant to do so if it is genuine in its claim on the issue of unmerchantibility of the plaintiff's goods. The question of healthy relationship as contended by the defendant did not arise at all as by exhibit LBC-4 which was issued earlier than YSC-1 the plaintiff clearly demanded payment of SD$134,250 for the supply of the goods to the defendant and there was no response from the defendant and not even to the effect that the goods supplied were unmerchantable! There was no response either from the defendant to exhibit LBC-6 issued by the plaintiff!

Issue (2)(b)

The defendant did not deny receiving the goods whereof the particulars were given to the defendant from time to time except to the effect that the debt as claimed in paragraph 3 of the statement of claim is denied. In any event the absence of particulars in respect of the supply of goods and their bills in the statement of claim is not fatal as there are provisions for the defendant to apply for better particulars. In fact, it would seem clear that the defendant was well aware of the particulars if we look at the various documents exhibited thereto. The defendant was not in any way thereby prejudiced.

Issue (2)(c)

Mr. S.C. Yap did not press on this interest issue and left it to the Court's discretion. I agreed with the contention of Mr. Siva, Counsel for the defendant on this issue and accordingly disallowed this claim.

For the reasons set out by me, I am of the opinion that the plaintiff proved its claim clearly and the defendant has failed to set up a *bona fide* defence or raise issues which ought to be adjudicated. The claim of the plaintiff, with the exception of prayer (2), was allowed with costs.